Petition

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Supreme Court of the United States

Summer Term, 1981

No.

KENNETH DALE RAINES, Plaintiff

versus

DIAMOND M COMPANY, ET AL, Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT, COURT OF APPEALS, STATE OF LOUISIANA

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SUPREME COURT OF THE UNITED STATES

Summer Term, 1981

No.

KENNETH DALE RAINES, PLAINTIFF

versus

DIAMOND M. COMPANY, ET AL, Defendant

QUESTION PRESENTED

Whether Diamond M Company was denied their right to a fair and impartial trial by jury, and deprived of property without due process of law under the United States Constitution as a result of the jurors' mistatements and furthermore by subsequent prohibition of the questioning of the jurors.

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KENNETH DALE RAINES, Plaintiff

versus

DIAMOND M COMPANY, ET AL, Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Diamond M Company, petitioner, prays that a writ of certiorari issue to review the judgment of the Third Circuit Court of Appeals, State of Louisiana, in the above captioned matter.

OPINIONS BELOW

The opinion on the merits by the Third Circuit Court of Appeals, became a final judgment when the Louisiana Supreme Court denied Diamond M Company's application for writs of certiorari (please see Appendix "A", infra).

JURISDICTION

The judgment of the Court of Appeals, Third Circuit, State of Louisiana, was entered on February 4, 1981. A rehearing was denied by the Third Circuit Court of Appeals. Subsequent thereto, writs of certiorari were applied for and denied by the Louisiana Supreme Court on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C., Section 2101.

QUESTION PRESENTED

Whether Diamond M Company was denied their right to a fair and impartial trial by jury, and deprived of property without due process of law under the United States Constitution as a result of the jurors' mistatements and furthermore by the subsequent prohibition of the questioning of jurors.

STATEMENT

Defendant, Diamond M Company, submits that both the Seventh Amendment to the U.S. Constitution, as applicable to the states through the Fourteenth Amendment, and the principles of due process guarantee Diamond M a right to a fair trial before an impartial jury. Diamond M submits that the record in this case clearly reveals that it was denied these rights.

Subsequent to the trial of this matter, certain facts were brought to the attention of counsel for Diamond M Company, which brought to the attention of counsel for Diamond M Company, which grounds defendant submitted for the basis of a new trial. Specifically, it was learned that the jury foreman, although questioned in detail on his association with counsel representing the plaintiff, did not relate that only two weeks before his trial, one of plaintiff's counsel had passed a mortgage and sale of the restaurant which the juror was opening the same week as the trial in this case. This was not brought to the attention of the court or defense counsel by either the juror or plaintiff's counsel. The record of the proceedings reflects the only testimony given by the jury foreman regarding his association with either of plaintiff's attorneys was the fact that one of the attorneys had represented him in a divorce, years prior to trial. Obviously, if counsel for defendant been aware of the extremely recent representation and communications with counsel for plaintiff in the case, the foreman would not have been chosen as a juror.

Secondly, as per the attached affidavit as an exhibit (which was attached to the Motion for a New Trial), one of the jurors testified that although all jurors were questioned as to whether they knew the plaintiff and his family, nevertheless, one of the jurors informed the juror giving the affidavit during the trial that he was per-

sonally friendly with both plaintiff and his father, who was present in the courtroom throughout the trial and that this particular juror was one of the leading proponents of granting plaintiff a larger verdict. Yet the record reflects that the juror testified under oath that he knew none of the parties involved in the lawsuit, stating that he "knew their names only".

Finally a third juror, as per the attached affidavit, informed the juror in question that she was related by marriage to one of plaintiff's counsel. The record also reflects that this particular juror testified that she only knew on of plaintiff's counsel because of the fact that she lived in the area all of her life.

REASONS FOR GRANTING THE WRIT

I. Diamond M Company was deprived of a fair and impartial trial, and deprived of property without due process of law as guaranteed under the United States Constitution.

It is respectfully submitted by reason of the foregoing facts, defendant simply could not have been given a fair and impartial trial by jury. Obviously, had undersigned counsel known of the facts and had the various proposed jurors been truthful on the voir dire examination, none of these three jurors would have been chosen. Therefore, it is probably that the jury verdict would not have been nine of twelve as required.

A new trial was sought based upon the above testimony and an attempt was made by undersigned counsel to subpoena and question the three jurors at the Motion for a New Trial. The trial Judge refused to allow any testimony on the Motion based upon a decision by the Fourth Circuit Court of Appeals (George v. Koehler, 4th Cir. No. 10,000, 302, handed down on April 15, 1980, with no published opinion). Undersigned counsel took the position that they were not attempting to impeach

the verdict but were rather attempting to show under the Louisiana Code of Civil Procedure Article 1814 that the jury had "behaved improperly so that impartial justice could not have been done." As pointed out, undersigned counsel argued that the matters in question were extrensic to the verdict and dealt only with proving that several of the jurors did not tell the entire truth on voir dire. As pointed out previously, Diamond M contends that if a party is not entitled to show that jurors did not tell the truth on voire dire then there is no real reason to even have a voir dire examination. Otherwise, such a holding would decree that a juror can intimately know one of the parties or counsel involved in the case or have very close ties to one of the parties, yet simply conceal this information and continue to sit on the jury, with the opposing party not being to bring this out before the Court in an attempt to obtain a new trial. Such arguably cannot be a fair and impartial trial by jury, as provided by the United States Constitution.

The Appellate Court admits that the trial Judge should have admitted the testimony of the jurors to determine whether they responded truthfully on voir dire, however, at the same time stated that after their review of the record they "cannot say the information withheld necessarily precluded defendants from obtaining a fair and impartial trial" and "convinces us that the jurors based their verdict solely on the evidence presented rather than on extrensic matters".

It is submitted that it is impossible for the Court to know whether these three jurors based their verdict solely on the evidence rather than on personal feelings or prejudices toward plaintiff and his counsel. Arguably, it should be presumed under the cited facts that defen-

dant was unable to obtain a "fair and impartial trial" and that that the burden should be proof that no impropriety "could have occured" by reason of the untruthful responses of the respective jurors.

It is submitted that this Court should seriously consider the case of Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977) cert. denied, 98 Sup. Ct. 1488, as applying to the facts herein. In Krause, the Court had to consider whether certain extraneous material influenced the verdict of the jurors. The Court in that case indicated that such facts were "presumptively prejudicial" with the burden of establishing the harmlessness and that no impropriety "could have occurred" by reason of the material on th part of the party opposing the new trial. As the Court in Krause points out, it was impossible for the Court to know whether the extraneous material influenced the verdict, citing Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954) and that such action requires the verdict being set aside and a new trial granted. It is respectfully submitted that such reasoning should be followed in the instant case. Thus, the question is not whether under the facts defendants obtained a fair and impartial trial, since such is impossible to know, but rather whether it is possible that they did not. In this case, Diamond M submits that the writ application be granted in order to assure that justice and equity be accomplished.

CONCLUSION

Considering all the pertinent facts, pertinent law, and foregoing argument presented to the Court, Diamond M Company prays that this court will do justice by granting this writ application.

Respectfully submitted,

ALLEN, GOOCH AND BOURGEOIS
A Professional Law Corporation

RAYMOND MORGAN ALLEN

and

ARTHUR I. ROBISON
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Attorneys for Diamond M Company

PROOF OF SERVICE

I, Raymond Morgan Allen, attorney for Diamond M Company and member of the bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for writ of certiorari on Kenneth N. Simmons and James L. Davis, Davis and Simmons, Post Office Box 1008, Many, Louisiana, and B.J. Hughes, Inc., through Richard A. Chozen, Post Office Box 820, Lake Charles, Louisiana and all other parties by depositing same in a United States Post Office with first class postage prepaid, addressed to the said attorneys.

Lafayette, Louisiana, July , 1918.

RAYMOND MORGAN ALLEN

APPENDIX A
NUMBER 8014

KENNETH DALE RAINES
Plaintiff & Appellee

versus

DIAMOND M. COMPANY, ET AL
Defendants & Appellants

Appeal from the Eleventh Judicial District Court for the Parish of Sabine, Judge John S. Pickett, Jr. presiding

Before Culpepper, Guidry and Cutrer, Judges
Culpepper, Judge

Kenneth Dale Raines brings this action under the Jones Act, 46 USCA, Sec. 688, et seq, and General Maritime Law against Diamond M Company, his employer, for injuries sustained while working as a roustabout on a semi-submersible drilling rig located off the shore of Louisiana in the Gulf of Mexico. Joined as parties defendant are Marathon Oil Company, the company for whom the drilling operations were being performed, B.J. Hughes, Inc. furnisher of certain equipment on the rig, and Bobby Painter and Ricky Greer, two Diamond M employees.

The claim against defendant Ricky Greer was dismissed on a motion for directed verdict after presentation of plantiff's case. After trial, the jury returned a verdict in favor of plaintiff and against the defendants, Diamond M, Marathon, and Bobby Painter for the sum of $350,000. Negligence was apportioned 80% to Diamond M, 15% to Marathon and 5% to Bobby Painter. The jury rejected paintiff's claim against Hughes. Diamond M, Marathon and Bobby Painter appealed. Plaintiff answered the appeal, seeking an increase in the award from $350,000 to $950,000, and judgment against B.J. Hughes, Inc. as well.

There are several issues: (1) Was the evidence sufficient to prove negligence on the part of Bobby Painter, foreman for Diamond M? (2) Can Bobby Painter, plaintiff's co-employee, be able under the Jones Act? (3) Is Marathon liable, either under the Jones Act or General Maritime Law? (4) Is B.J. Hughe, Inc. liable? (5) Was plaintiff contributorily negligent? (6) Was the damage award excessive? (7) Were excessive costs taxed against defendants? (8) Were excessive expert witnesses' fees assessed against defendants? (9) Did the trial court err in refusing to allow evidence of false answers by jurors on voir dire at the motion for a new trial and also in refusing to grant a new trial?

GENERAL FACTS

The Diamond M rig, known as the "Century", was located approximately 130 miles off the coast of Louisiana in the Gulf. Pursuant to an offshore drilling contract entered into with Marathon, Diamond M furnished the drilling vessel, equipment and necessary personnel for drilling operations. The contract further provided that Diamond M had the authority to control and direct the details of the work. However, Marathon had personnel on board the Century during the drilling.

Plaintiff, 22 years of age, had been employed by Diamond M for approximately eight months. On the date of the accident, he was a member of a crew on the Century engaged in placing a casing hanger into an opening in the drill floor deck, known as a rat hole. The casing hanger, a hollow tubelike structure approximately six feet long and 13 inches in daimeter, and weighing several hundred pounds, was hooked to a crane cable by the crew. The cable was run through the center of the casing hanger and attached to the end with a hook. Bobby Painter, operator of the crane located about 70 feet from the rat hole, lifted the casing hanger and

moved it toward the hole. Plaintiff and other members of the crew directed Painter by hand signals and guided the casing hanger into the rat hole as it was being lowered by Painter. A problem developed when the casing hanger would not completely lower into position due to an obstruction in the hole. Painter raised the hanger a few inches and let it drop several times by its own weight. When this failed, the crew directed Painter to raise the casing hanger out of the rat hole. As the hanger was almost completely out of the hole, the hook somehow came loose from the bottom of the casing hanger. The casing hanger fell upon plaintiff, causing him severe injuries.

NEGLIGENCE OF BOBBY PAINTER AND DIAMOND M

We recognize at the outset our limited role in reviewing the sufficiency of the evidence. Although this court is constitutionally authorized to review both the law and the facts in civil cases, under Federal Law and jurisprudence, which we must follow in cases applying Federal statures, the jury's finding of fact incases applying Federal statutes, the jury's finding of fact cannot be disturbed by an appellate court unless there is no reasonable evidentiary basis for the jury's conclusions. Trahan v. Gulf Crews, Inc., 260 La. 27, 255 So.2d 63 (1971) and cases cited therein.

The Jones Act grants to any seaman a cause of action for personal injury caused by negligence of his employer. 46 USCA, Sec. 688. Plaintiff's status as a seaman within the meaning of the Jones Act is not disputed. Also, there is no dispute that plaintiff was employed by Diamond M at the time of the accident.

As plaintiff's Jones Act employer, Diamond M was under a duty to provide plaintiff with a reasonably safe place to work. Spinks v. Chevron Oil Company, 507 F.2d 216 (5th Cir. 1975). This broad duty is such that if plantiff

can show his injuries were the result of even the slightest negligence of his employer, liability follows. Davis v. Hill Engineering, Inc. 549 F. 2d 314 (5th Cir. 1977).

Defendants argue plaintiff has failed to prove his injuries were caused by the negligence of any party. They offer no explanation for the cause of the accident. Defendants point to evidence that the procedure followed in installing the casing hanger had been used several times in the past by the same crew without mishap. Essentially, defendants argue it was an unavoidable accident, and that no one was negligent.

In its brief, Diamond M emphasizes the lack of evidence to pinpoint the exact cause of the hook becoming disengaged from the bottom of the casing hanger. Bobby Painter and the members of the crew who were at the rat hole testified that Painter raised the casing hanger to a position where its bottom was about flush with the top of the rat hole, the hanger fell and struck plaintiff. Plaintiff testified he was told after the accident by Bobby Painter that the hook on the end of the cable struck the top of the rat hole and "sprung out". However, in previous deposition testimony, plaintiff stated he was told the hook bent. Under cross-examination at trial, plaintiff admitted he had no personal knowledge as to why the casing hanger fell. Arnold MacAlexander, a member of the crew, testified that when the bottom of the casing hanger came flush with the top of the rat hole the hook sprang loose somehow. In his accident report, BobbyPainter stated the "the hook simply hung on the edge" of the rat hole and came off. But, during trial, Painter admitted this was speculation on his part.

Under the Jones Act, a jury verdict may be sustained when there is evidence from which a jury might reasonably infer negligence. Sanford Bros. Boats, Inc. v.

Vidrine, 412 F. 2d 958 (5th Cir. 1969). In the present case, there is evidence from which the jury could have reasonably inferred negligence by Painter, the foreman For Diamond M. In the first place, there is evidence that the procedure being used was not reasonably safe. James B. Bison, an expert drilling consultant, testified he was thoroughly familiar with the assembly of casing hangers and had frequently supervised their installation, but that he had never seen nor used the procedure employed at the time of the accident. He suggested two safer methods. One was to attach a handling tool to the top of the hanger and tie the cable to the handling tool. The other method was also a procedure for attaching the cable to the top of the hanger. Bison prepared a diagram of these procedures, which was filed in evidence and observed by the jury. From Bison's testimony, the jury could have reasonably inferred the procedure being used by Diamond M was unsafe, that it was not customarily used in the industry, and that there were other safer procedures which Painter could and should have used.

Moreover, the evidence shows that Painter was in charge of the roustabout crew, that he had instructed the crew to use this procedure, and that they had used it several times before. If the procedure was unsafe, as Bison testified, then Painter was negligent in instructing the crew to use it.

Furthermore, the jury could have inferred that Painter was negligent in not taking sufficient precautions to see that the casing hanger would go down into the rat hole. Painter testified he did not measure the casing hanger and did not know that this rat hole had a false bottom which prevented the casing hanger from going all the way down.

We conclude there is sufficient evidence from which the jury could have inferred negligence by Painter, which negligence is of course imputed to his employer, Diamond M.

PAINTER'S LIABILITY

The jury found Painter was 5% negligent. This negligence is imputed to his employer, Diamond M, under the doctrine of respondent superior. however, the jury's verdict is in error insofar as it holds Painter personally liable. Under the Jones Act, an employee-employer relationship is essential to recovery. Spinks v. Chevron, supra. Thus, Painter, as a co-employer of plaintiff, could not be liable under the Jones Act. There is no contention that Painter is liable under General Maritime Law. Accordingly, the claim against Painter must be dismissed.

MARATHON'S LIABILITY

The question becomes more complex with respect to the liability of Marathon Oil Company. The negligence of Marathon was assessed by the Jury at 15%. To prevail against this defendant under the Jones Act, plaintiff must prove Marathon was also his employer. While we recognize the possibility for a seaman to have more than one Jones Act employer, Spinks v. Chevron, supra, the evidence does not support such finding in the present case.

This particular situation most frequently arises in borrowed servant context. In order for plaintiff to be considered as an employee of Marathon, it would be necessary to show that Marathon exercised some form of control over plaintiff's activities. See Ruiz v. Shell Oil Company, 413 F. 2d 310 (5th Cir. 1969). According to the testimony of several witnesses, Marathon had one or

two employees on the Century on the day plaintiff was injured. Under the drilling contract, Marathon furnished equipment and personnel for certain services to be performed. However, we find no evidence of control or right to control by Marathon or its personnel of the job being performed by plaintiff at the time of the accident. To the contrary, all of the evidence shows that Diamond M was solely in control of this aspect of the job. We conclude there was no reasonable evidentiary basis on which the jury could have found that Marathon was plaintiff's Jones Act employer. Thus, there can be no liability by Marathon under the Jones Act.

Nor do we find that Marathon could be liable under General Maritime Law. From his pleadings and brief on appeal, it is clear that plaintiff is relying solely on Jones Act negligence as the theoretical basis for his couase of action. Plaintiff does not contend that Marathon was either the owner or the operator of the vessel.

LIABILITY OF HUGHES

As we interpret the facts, the Diamond M crew was installing the casing hanger so that a piece of B.J. Hughes' equipment could be attached to the top portion of the casing hanger, known as Vetco head. It is undisputed that an employee of B. J. Hughes, Billy Griffin, was present while the Diamond M crew was installing the casing hanger. One crew member, Jerry Durr, testified that Griffin was supervising the operation. Other members of the crew testified that Griffin was not in charge but was merely lending a hand so that he could attach his tool after the casing hanger was in place. As with the case of Marathon, the requisite degree of control necessary for plaintiff to be considered a borrowed servant of the defendant, B. J. Hughes, is simply lacking, We find no error in the jury's finding on this issue.

PLAINTIFF'S CONTRIBUTORY NEGLIGENCE

The defendants alternatively contend that plaintiff's right to recover damages for his injuries should be reduced due to his own negligence. They argue that plaintiff, as a lead worker, failed to insure that the casing hanger was properly attached to the cable, and that he was negligent in deciding to remove the casing hanger when it would not position properly. This argument is without merit. Plaintiff was performing his duty in the manner in which he had been instructed by Painter. Furthermore, even assuming plaintiff made the decision himself to raise the casing hanger, he could not have foreseen that the hook would spring loose. We find no error in the jury's conclusion that plaintiff was not contributorily negligent.

SUMMARY OF LIABILITY

Since Diamond M is the only Jones Act employer, since neither Marathon nor Hughes is liable under the Jones Act or under General Maritime Law, and since the plaintiff is not contributorily negligent, Diamond M is solely liable for all of plaintiff's damages.

EXCESSIVENESS OF THE JURY AWARD

Immediately following plaintiff's accident, he was flown by helicopter to Morgan City. He had severe internal bleeding, causing him to go into shock. His spleen was surgically removed and his liver repaired. Plaintiff also sustained nine broken ribs, a punctured lung, and fractures of two lumbar vertebrae, the transverse processes of L3 and L4. Several days after the initial surgery, Dr. Askew performed an emergency operation to remove blood from the chest cavity. Plaintiff remained hospitalized for 19 days.

After returning home to recuperate, plaintiff began ex-

periencing chest pains and nausea and vomiting blood. He was admitted to the Schumpert Medical Center at Shreveport, where surgery was performed to remove his gallbladder, which had become infected. The hospital stay this time was 17 days. After he was released, he continued having gastric problems and was readmitted to the hospital. Diagnosis revealed that plaintiff had a severe bleeding ulcer, for which treatment followed. He was finally released from Schumpert six days later.

Dr. William Wilder, a specialist in gastroenterology, testified that plaintiff's gallbladder problems were the result of the injury to the liver. He was also of the opinion that plaintiff's ulcer was due to the culmination of stress from his previous injuries and surgery.

Following his recuperation, plaintiff sought employment as a welder's helper but soon began experiencing back pains. Dr. Zum Brunnen, an orthopedic, surgeon, examined plaintiff for his back complaints. X-rays revealed the fractures of the two transverse processes. Dr. Brunnen predicted that plaintiff would have a permanent problem with his back and would be unable to work as a roustabout or engage in any other occupation involving heavy manual labor. He did testify that plaintiff should be able to lead a normal life in terms of recreation and could do some moderate work.

Dr. Daniel Kingsley, also an orthopedist, gave plaintiff a more favorable prognosis. According to Dr. Kingsley, plaintiff would be able to return to his former job as a roustabout after undergoing certain physical rehabilitation therapy to loosen up the stiffness in his back.

Dr. Randolf Rice, an economist, offered testimony concerning lost wages. Using an income growth factor of 8½%, which included inflation, Dr. Rice estimated plaintiff's future wages, based on a 38.4 years work-life

expectancy, to be $649,824. Subtracting projected future earnings at the minimum wage level, which plaintiff would probably earn in his disabled condition, Dr. Rice determined that the total future loss of wages would be $387, 966.

Defendant contends it was error to include inflation as a factor in determing future wage loss. The rule in the Fifth Circuit, established in Johnson v. Penrod Drilling Company, 510 F2d 234 (5th Cir. 1972), was that inflation and cost of living increases should not be used to determine future pecuniary losses due to the speculative nature of these factors. Recently, however, in Norfolk & W. Ry. Company v. Leipelt, _____ U.S. _____, 100 S. Ct. 755, 62 L. Ed 2d 689 (1980), these very factors were approved by the Supreme Court in the determination of future wage losses. This recent ruling of the Supreme Court is controlling.

Jury awards under Maritime Law and the Jones Act "Must stand unless the appellate courts find there is no law and no evidence to sustain them, rendering them, as some courts have put it, so excessive as to be obviously punitive, motivated by predjudice, passion, partiality or corruption." Trahan v. Gulf Crews, Inc., supra (255 So.2d at 70). In the present case, the total award fixed by the jury, including general damages for pain and suffering damages for pain and suffering, was less than the projected loss of future earnings calculated by Dr. Rice. The jury apparently was not entirely convinced either by the testimony of Dr. Brunner or Dr. Kingsley concerning plaintiff's prospect of future employment. We have no doubt that plaintiff sustained grevious injuries as a result of the accident and underwent a lengthy and painful recuperation. In view of the conflicting medical testimony as to plaintiff's prognosis and residual disability, however, we hesitate either to increase or

decrease the awards by the jury. Under the law and evidence presented, we cannot say that the award was so low as to shock the conscience or so excessive as to be punitive.

The district court awarded plaintiff pre-judgment interest from the date of judicial demand. Appellants contend that interest should run only from date of judgment. We agree. Several federal decisions have denied pre-judgment interest interest in Jones Act claims brought on the law side. Barrios v. Louisiana Construction Material Company, 465 F. 2d 1157 (5th Cir. 1972). Sanders Bros. Boats, Inc. v. Vidrine, supra. This court has also specifically ruled on this point. See Morris v. Trans-World Drilling Company, 365 So. 2d 46 (La. App. 1978). Accordingly, the trial judge was in error in including pre-judgment interest. Whether pre-judgment interest is allowed under General Maritime Law is not before before us.

EXCESSIVENESS OF COSTS

Defendants-appellants contend the following items assessed against them as costs of court are either excessive or should not have been allowed:

"a. 1/15/80 Susan Flanary - Ct. Rep. Pd. by D & S)	$249.50
b. 2/5/80 M & S Rep. service (Pd. by D & S)	21.70
c. 2/5/80 Womack Ct. Rep. (Pd. by D & S	187.43
d. 3/24/80 Susan Flanary (Pd. by D & S)	249.50
e. 3/31/80 Dr. Fred L. Price (Pd. by D & S)	1,027.76
. 3/31/80 Internal Med Asso. (Dr. Langford & Wilder) (Pd. by D & S)	1,000.00
g. 4/1/80 Harrahan Rep. Service	358.11
h. 4/1/80 Jack L. Grindle	1,500.00

l. 4/1/80 W. M. Wilder	1,500.00
j. 4/1/80 Fred L. Price	1,527.76
k. 4/1/80 J. Randolf Rice (Pd. by D & S)	780.00
L 4/1/80 James Bison	375.00

The above list of costs to which appelants object is taken from the statement of costs totaling $12, 769 mailed by the clerk of the district court to counsel for Diamond M on April 2, 1980, which was the same date that the judgment appealed was rendered and signed by the district judge. The clerk of court's statement for costs is not part of the record before us. Counsel for diamond M has attached a copy of the statement to his brief filed in this court. On the statement, the notation ((Paid by D & S", apparently means that this item was paid by Davis and Simmons, attorneys for the plaintiff.

appellants raise several serious questions concerning the above listed items to which they object. For instance, they state in their brief that the January 15, 1980 charge by Susan Flanary in the sum of $249.50 and the March 24, 1980 charge by Susan Flanary for $249.50 are double charges for discovery depositions by five witnesses, and that only one of these depositions was introduced in evidence. Appellants point to the statute, LSA-R.S. 13:4533, and to jurisprudence, Parish v. Bill Watson Ford, Inc., 354 so.2d 727 (La. App. 4th Cir. 1978). that the costs of discovery depositions not used at trial may not be charged against the party cast.

Also, appellants raise a serious question as to the March 31, 1980 payments by plaintiff's attorneys to Dr. Fred L. Price in the sum of $1,027 and to Internal Medical association (Drs. Langford & Wilder) in the sum of $1,000. In their brief, appellants state this case was initially fixed for trial on February 6, 1980 but was continued and refixed for trial on March 24, 1980, and that these two items represent the charges of Dr. Price and

"(9) Often, for convenience and to avoid unnecessary repetitionin court appearances the amount and reasonableness of the expert's fee is determined by their testimony at the time they testify on the merits. However, as provided by LSA-C.C.P. Art 1920, costs "may betaxed by a rule to show cause" incidental and subsequent to the original proceedings. See Succession of Dr. Wilder respectively for time which they say they set aside on their calendars for the trial on February 6. Appellants say there was no trial on February 6, 1980, and they cite jurisprudence for the rule that no expert witness fee for a court appearance can be assessed as costs where no appearance by the expert at a trial took place. See Gaspard v. Aetna Insurance Company, 390 So.2d 243 (La. App. 3rd Cir. 1980) and State, Department of Highways v. Slaemi, 193 So.2d 252 (La. 1967).

Appellants also contend that some of the expert medical witness fees fixed by the trial judge in his judgment are grossly excessive, as for instance the April 1, 1980 fee of Dr. Wilder in the sum of $1,500 and the April 1, 1980 fee of Dr. Price in the sum of $1,527. These two physicians are orthopedic surgeons who traveled from Shreveport to Many on the date of trial, but the record shows the trial was interrupted and they were permitted to testify when they arrived and that their testimony required little or no preparation. These fees may indeed be excessive under LSA-R.S. 13:3666 which provides the criteria for fixing the amount of expert witness fees is "the value of time employed and the degree of learning or skill required."

In the present case we do not have sufficient evidence in the record before us to determine the issues raised by appellants as to the costs to which they object. We faced asimiliar situation in State, Department of Highways v Moresi, 189 so.2d 292 (La App. 3rd Cir. 1966), where we held:

of Franz, 242 La. 875, 139 So.2d 216 and (related case) 236 La. 781, 109 So.2d 92; also, Foster v. Stewart, La.App. 1 Cir., 161 So.2d 334. In fact, in the jurisprudence prior to the enactment of the 1960 Code of Civil Procedure, there are expressions that in ordinary civil suits expert fees and other costs should be fixed by the subsequent rule to show cause rather than by the judgment on the merits. Daly v. Abramson, La.App, 2 Cir., 117 So.2d 772, 781 (syllabus II); Randazzo v. Lucas, La. App.Orl., 106 So.2d 490, 496-97 (Syllabus II).

(10) Under all the circumstances, we think the interests of fairness will be served in the respect of court costs incurred by the landowner if we act aside the fixing of the expert fees by the trial court, in contemplation that same will be fixed by a rule to show cause if not agreed upon by the parties.

In the present case also we think the interests of fairness will be best served if we set aside the fixing of the expert witness fees by the trial court and reserve to the defendant-appellant cast the right to file a rule to fix both the expert witness fees and all other costs to shich the defendant cast objects and upon which the parties are unable to agree.

MOTION FOR A NEW TRIAL

Defendants, Diamond M, Marathon and Painter, filed a motion for a new trial, alleging that certain jury misconduct prevented these defendants from obtaining a fair and impartial trial. The complaint made by counsel for appellants is that based on an affidavit made by one of the jurors subsequent to the trial, counsel for these defendants became aware that two weeks before the trial one of plaintiff's counsel had passed a mortgage and sale for the foreman of the jury. Defendants' counsel also was informed that another juror was personally

acquainted with plaintiff, while a third juror was related by marriage to one of plaintiff's counsel. Although pertinent questions were directed to each prospective juror, none of these essential facts were elicited on the voir dire examinations.

at the hearing for a new trial, defendants' counsel attempted to examine these jurors as to these matters. Relying on a recent Fourth Circuit decision, George v. Koehler, _____ So.2d _____ (La. App. 4th Cir. 1980), the trial judge refused to allow any testimony by these jurors.

In George v. Koehler, supra, the appelants contended that two of the jurors concealed on voir dire examination certain facts that would have led to possible challenges for cause and peremptory challenges. Although the nature of the information withheld by these jurors was not mentioned, the court found that the jurors did not clearly understand the extent of information to be given in response to the attorney's questions. Referring to Article 775 of the code of Criminal Procedure, which states that a mistrail may be ordered when false statements of a juror on the voir dire prevent a fair trial, the court concluded no injustice or prejudice resulted from the information withheld.

We are aware of the general rule which prohibits the admissibility of affidavits or other testimony of jurors to impeach their own verdict. Lackney v. Jones, 373 So.2d 595 (La. App. 3rd Cir. 1979), Washington v. Lake City Beverage, Inc., 352 So.2d 717 (La. App. 3rd Cir. 1977), Blandino v. Brown Erection Company, Inc., 341 So.2d 577 (La. App. 2d Cir. 1977). We agree with defendants that a distinction exists between impeaching the jury verdict and attempting to ascertain whether the jurors responded truthfully on voir dire. in this regard, we feel the trial judge should have admitted the testimony which may have indicated imcomplete responses on voir dire.

However, as in the George v. Koehler decision, we cannot say the information withheld necessarily precluded defendants from obtaining a fair and impartial trial. Our review of the record as a whole, including the voir dire examination, convinces us that the jurors based their cerdict solely on the evidence presented rather than on extrinsic matters.

DECREE

For the reasons assigned, the judgment appealed is reversed in part, amended in part and affirmed in part as follows:

That portion of the judgment which awards plaintiff legal interest on the sum of $350,000 from date of judicial demand until paid is reversed and set aside, and it is now decreed that legal interest on the sum of $350,000 be paid from the date of the judgment appealed herein until paid.

That portion of the judgment which fixes the fees of expert witnesses is reversed, and there is reserved to the defendant, Diamond M Company, the right to file within 30 days after this judgment becomes final a rule to show cause why the fees fixed by the district judge should not be reduced or disallowed, and in the absence of such a rule being filed by Diamond M within said 30-day period, the expert witness fees fixed by the trial judge are affirmed.

That portion of the judgment which assesses all costs against Diamond M Company, Marathon Oil Company and Bobby Painter in proportion to their negligence, is reversed and set aside, and it is now decreed that all

costs in the trial court be assessed against the defendant, Diamond M Company, reserving however to Diamond M company the right to file within 30 days after this judgment becomes final a rule to show cause why any of the costs assessed should not be changed or disallowed, but in the absence of Diamond M filin such a rule within said 30-day period, the costs assessed are affirmed.

Otherwise than as herein reversed or amended, the judgment appealed is affirmed. All costs of this appeal are assessed against Diamond M Company.

REVERSED IN PART, AMENDED IN PART AND AFFIRMED IN PART.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF SABINE

Before me, the undersigned authority, personally came and appeared VERNA E. MATTHEWS, who, being duly sworn deposed and said:

That she resides 760 Ritter Street, Many, Louisiana and was one of the jurors which sat on the trial entitled "Kenneth Dale Raines vs. Diamond M Company, et al", Eleventh Judicial District Court, Number 31,211, Sabine Parish, Louisiana.

That during the course of the above trial, although the jurors were questioned on whether they knew the plaintiff or his family, one other member of the jury, Wayne Leggett, nevertheless, informed her that he was personally acquainted with both plaintiff, Kenneth Raines, and his father who present the Courtroom throughout the trial. Further, he was one of the leading proponents of granting plaintiff a large verdict in this case.

That deponent further says that during trial a second juror, Susan McComic, informed her that she was related by marriage to one of plaintiff's counsel, James Davic.

That deponent further says that during trial a second juror, Susan McComic, informed her that she was related by marriage to one of plaintiff's counsel, James Davis.

Further, that although admonished by the Judge to not discuss the case until all of the evidence was in, nevertheless, many of the jurors from the first day evidence was heard openly discussed the testimony of various witnesses among themselves and openly expressed opinions as to both liability and damages.

S/ VERNA E. MATTHEWS

SWORN TO AND SUBSCRIBED before me this 16th day of April, 1980.

S/NOTARY PUBLIC

KENNETH DALE RAINES

versus

DIAMOND M COMPANY, ET AL
Eleventh Judicial District Court
Number: 31,211
Sabine Parish, Louisiana

MOTION FOR A NEW TRIAL

NOW INTO COURT, through undersigned counsel, come DIAMOND M COMPANY, MARATHON OIL COMPANY and BOBBY PAINTER, defendants in the above entitled and numbered cause, who, respectfully represent that:

I.

The judgment rendered against them herein on the 2nd day of April, 1980, service being made on undersigned counsel on April 9, 1980, is contrary to the law and the evidence in the following particulars and as is more fully set out in detail in the enclosed brief.

(1) The jury behaved improperly so that impartial justice has not been done.

(2) The evidence presented at trial failed to support a finding of negligence on the part of DIAMOND M COMPANY, BOBBY PAINTER, and MARATHON OIL COMPANY.

(3) The evidence presented at trial clearly indicates contributory negligence on the part of the plaintiff.

(4) The award of the jury to the plaintiff was excessive.

(5) The judgment should have granted interest only from date of judgment.

(6) Costs taxed to the defendants are excessive.

II.

Defendants are aggrieved by the said judgment and desire and are entitled to a new trial.

WHEREFORE, defendants, DIAMOND M COMPANY, MARATHON OIL COMPANY and BOBBY PAINTER, pray that plaintiff, KENNETH RAINES, be duly ordered to appear at a date and hour to be fixed by this Court and show cause why the judgment rendered herein on the 2nd day of April, 1980, should not be set aside and annulled and why a new trial should not be granted.

Respectfully submitted,

ALLEN,GOOCH & BOURGEOIS
A Professional Law Corporation

S/ARTHUR I. ROBSON
Post Office Box 3204
Lafayette, Lousiiana 70502
Telephone: (318) 233-5056

Attorney for Diamond M Company,
Marathon Oil Company and
Bobby Painter

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Motion has this day been forwarded to all counsel of record, by depositing same in the U.S. Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 15 day of April, 1980.

S/arthur i. robison

KENNETH DALE RAINES

versus

DIAMOND M. COMPANY, ET AL

KENNETH DALE RAINES

versus

DIAMOND M COMPANY, ET AL

Eleventh Judicial Court
Number: 31,211
Sabine Parish, Louisiana

ORDER

Considering the foregoing Motion for a New Trial,

LET plaintiff, KENNETH RAINES, be and is hereby ordered to show cause in this Court on the 12th day of May, 1980, why judgment rendered herein on the 2nd day of April, 1980, should not be set aside and annulled and a new trial granted in this matter.

Many, Louisiana, on this 28th day of April, 1980.

S/JOHN S. PICKETT, JR.
DISTRICT JUDGE

AFFIDAVIT OF APPLICANT

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR I. ROBISON, who, being duly sworn deposed and said:

That he is counsel for and representing DIAMOND M COMPANY, MARATHON OIL COMPANY and BOBBY PAINTER, in the above captioned claim and the applicant in the above and foregoing motion for a new trial;

that since the trial of this case and the rendition of judgment therein, facts have been brought to his attention important to this cause including the evidence of improper jury behavior as set out in the attached affidavit of Verna E. Matthews,as well as the fact that one of the jurors, Donald Strahan, had been represented by one o of the counsel for plaintiff and had business transactions with him only two weeks before trial, as per the attached real estate chattel and collateral mortgage indicates.

S/ARTHUR I. ROBISON

SWORN TO AND SUBSCRIBED before me this 15th day of April, 1980.

S/NOTARY PUBLIC

KENNETH DALE RAINES

versus

DIAMOND M COMPANY, ET AL

NUMBER: 31,2111
Eleventh Judicial District Court
Sabine Parish, Louisiana

JUDGMENT PURSUANT TO JURY VERDICT

In the above entitled and numbered cause, same having been duly tried before and submitted to a jury of twelve (12) persons duly impaneled and sworn; the jury having returned into court on the 28th day of March, 1980, a special verdict consisting of answers to eight (8) interrogatories, signed by its foreman, Donald R. Strahan; therefore, in accordance with said special verdict, the law and evidence being in favor thereof:

IT IS ORDERED, ADJUDGED AND DECREED that the special verdict of the jury be, and it is hereby, amde the judgment of this court, and, accordingly, the plaintiff, Kenneth Dale Raines, be, and he is hereby, awarded an granted judgment against the defendants, Diamond M Company, Marathon Oil Company, and Bobby Painter, in the full sum of $350,000.oo, together with legal interest thereon from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the special verdict of the jury apportioning the negligence among and between these defendants is made the judgment of this court and the percentage of negligence of each of these defendants be, and the same is hereby, fixed as follows:

(1) Diamond M Company..... 80%
(2) Marathon Oil Company 15%
(3) Bobby Painter 5%

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fees of expert witnesses who testified herein on behalf of the plaintiff are fixed in the following amounts and taxed as part of the costs herein, to-wit:

(1) Edward Askew, M.D. ..... $ 400.00
(2) Jack L. Grindle, M.D. 1,500.00
(4) Fred L. Price, M.D. 1527.76
(5) James L. Zun Brunnen, M.D. 250.00
(6) Richard H. Galloway, Ph. D. 350.00
(7) G. Randolf Rice, Ph. D. 780.00
(8) James E. bison 375.00

I HEREBY CERTIFY that three copies of the above and foregoing has this day, Saturday, May 9, 1981, been served on Kenneth Dale Raines, through his attorneys of record, Kenneth N. Simmons and James L. Davis, Davis and Simmons, P.O. Box 1008, Many, Louisiana, and B.J. Hughes, Inc. through its attorney of record, Richard A. Chozen, P.O. Box 820, Lake Charles, Louisiana and all other parties by depositing same in a United States post office with first class postage prepaid, addressed to counsel of record pursuant to and in compliance with all the requirements as set forth in Rule 33.1 and Rule 33.3 (b) of the United States Supreme Court.

Lafayette, Louisiana, this 9th day of May, 1981.

RAYMOND MORGAN ALLEN

S/ARTHUR I. ROBISON

Sworn to and subscribed before me, this 9th day of May, 1981.

FRANK A. FLYNN, Notary Public in and for the Parish of Lafayette, State of Louisiana

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Diamond M Company, Marathon Oil Company, and Bobby Painter, pay all costs of this suit in the same proportions as the percentages of negligence fixed hereinabove.

JUDGMENT READ, RENDERED AND SIGNED this 2nd day of April, 1980, at Many, Louisiana, pursuant to the jury verdict returned on March 28, 1980.

S/JOHN S. PICKETT, JR.
Judge

Opposition

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

NUMBER 81-586

SUPREME COURT OF THE UNITED STATES

SUMMER TERM, 1981

KENNETH DALE RAINS, PLAINTIFF

VERSUS

DIAMOND M COMPANY, ET AL, DEFENDANT

ON APPEAL FROM THE THIRD CIRCUIT COURT
OF APPEAL, STATE OF LOUISIANA

ANSWER TO PETITION FOR WRIT OF CERTIORARI OF DIAMOND M COMPANY

DAVIS AND SIMMONS
Kenneth N. Simmons
James L. Davis
P. O. Box 1008
Many, LA 71449

ATTORNEYS FOR KENNETH DALE RAINS

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FACTS

On March 23, 1978, Kenneth Dale Rains was working as a roustabout in the Gulf of Mexico. He was working for Diamond M Company on a semi-submersible drilling rig named "The Century." The Century was being used by Diamond M Company to drill a well in the Gulf of Mexico approximately 100 miles from Morgan City, Louisiana. Diamond M Company was under contract with Marathon Oil Company to drill this well. Kenneth Dale Rains had been employed by Diamond M Company for approximately eight months prior to the accident.

Bobby Painter was also en employee of Diamond M Company. He was the crane operator. The crane he operated was rather large. It was situated on a pedestal with a 125 foot long boom. The crane was used to lift and move equipment around The Century. It was attached to The Century on the second level.

Bobby Painter was the supervisor of Kenneth Dale Rains. Bobby Painter had three other people in his crew besides himself and Kenneth Dale Rains. They were Ray McAlexander, Ricky Greer and Jerry Durr.

On March 23, 1978, Kenneth Dale Rains, Ray McAlexander, Jerry Durr, Bobby Painter and an employee of B. J. Hughes, Inc., to-wit, Billy Griffin, were assembling a casing hanger on the second level of The Century. The casing hanger was approximately 6 feet long, 13 3/8 inches in diameter, and weighed several hundred pounds. A tool called a Vetco head was attached to the top of the casing hanger. The casing hanger was laying on the second level of The Century. The Vetco head was attached to it. The casing hanger was lifted by the crane, operated by Bobby Painter, and placed into a rathole in the floor of the second level. Kenneth Dale

Rains, Ray McAlexander, Jerry Durr and Billy Griffin were all assisting in this operation.

To attach the casing hanger to the crane, the crane cable was run down through the casing and hooked on the bottom edge of the casing. Once the hook was in place, Bobby Painter, the crane operator, lifted the casing hanger from the floor of the second level, moved it into position over the rathole, and lowered the casing hanger into the rathole. All of the other men were standing around the rathole assisting in this operation.

As the situation developed, the casing hanger would not go all the way into the rathole as it was supposed to have, and Bobby Painter lifted the casing hanger back out of the rathole. As he was preparing to lower the casing hanger back into the rathole, the casing hanger became disengaged from the crane cable.

The casing then fell upon Kenneth Dale Rains, causing serious injury to him.

Trial of this matter was begun on March 24, 1980, and on March 28, 1980, a jury of twelve persons returned a special verdict in favor of Kenneth Dale Rains, and against Diamond M Company, Marathon Oil Company, and Bobby Painter, in the full sum of $350,000.00, together with legal interest. A judgment pursuant to this jury verdict was signed on April 28, 1980.

An appeal was taken from this jury verdict. The Court of Appeal, Third Circuit, State of Louisiana, on February 4, 1981, rendered judgment reversing in part, amending in part, and affirming in part, the trial court judgment. A rehearing was denied by the Third Circuit Court of Appeal. Subsequent thereto, writs of certiorari were applied for and denied by the Louisiana Supreme Court.

REASON, LAW AND ARGUMENT FOR DENYING THE WRIT

The law is clear in the matter of using jurors to impeach their verdict. A case almost identical to the one at hand is George v. Koehler, et al, No. 10,302, La. App. 4th Cir. 1980. In this case the appellants contended that two of the jurors did not disclose, or that they concealed, certain facts which would have lead to possible challenge for cause, and certainly preemptory challenges. Appellants related the problem to the Court in that they contended that the voir dire questioning had not been transcribed and preserved. The appellants attempted to furnish to the court statements obtained from the jurors post-trial. The court permitted the appellants to offer the affidavit of one defendant as well as depositions of some jurors. In reviewing Code of Civil Procedure Article 1814, the court stated:

> "Primarily, we state that we adhere to the jurisprudential rule that prohibits the admissibility of depositions of jurors to impeach their own verdict on grounds of misconduct on the part of any of the jurors. . . .As a matter of reference, we refer to Article 775 of the Code of Criminal Procedure which states that a mistrial may be ordered when false statements of a juror on voir dire prevent a fair trial. That article obviously grants the trial judge discretion in his consideration of the false statement, and as pointed out in the case of State v. Forbes, 348 So. 2d 983 (La. 1977), the mistrial is authorized only in specified instances where unnecessary prejudice results to the accused. Our examination of the record does not show impartiality or injustice."

We further refer the Court to the following cases: Lachney v. Jones, 373 So. 2d 595 (La. App. 3d Cir. 1979); McAdams v. Holden, 349 So. 2d 900 (La. App. 1st Cir. 1977); Morris v. Guidry, 335 So. 2d 75 (La. App. 3d Cir. 1976); Washington v. Lake City Beverage, Inc., 352 So. 2d 717 (La. App. 3d Cir. 1977); Dieudonne v. Guidry, 336 So. 2d 990 (La. App. 3d Cir. 1976); and

Barber v. St. Francis Cabrini Hospital, 345 So. 2d 1307 (La. App. 3d Cir. 1977).

The Court of Appeal, Third Circuit, State of Louisiana, in its judgment rendered February 4, 1981, stated as follows:

> "However, as in the George v. Koehler decision, we cannot say the information withheld necessarily precluded defendants from obtaining a fair and impartial trial. Our review of the record as a whole, including the voir dire examination, convinces us that the jurors based their verdict solely on the evidence presented rather than on extrinsic matters."

CONCLUSION

Considering the pertinent facts, law and foregoing argument, we respectfully

submit that the writ application of Diamond M Company be denied at its cost.

Respectfully submitted:

DAVIS AND SIMMONS
P. O. Box 1008
Many, LA 71449

KENNETH N. SIMMONS

JAMES L. DAVIS
Attorneys for
Kenneth Dale Rains

CERTIFICATE

I, Kenneth N. Simmons, attorney for Kenneth Dale Rains, do certify that a copy of the above and foregoing Answer to Petition for Certiorari has been served on Raymond Morgan Allen and Arthur I. Robison, attorneys for Diamond M Company, and Richard A. Chozen, attorney for B. J. Hughes, Inc., by depositing a copy of same in the U. S. Mail, postage prepaid, to each at his proper address.

Many, Louisiana, this 13th day of January, 1982.

KENNETH N. SIMMONS